

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FORESTAL GUARANI S.A.,

Plaintiff,

v.

DAROS INTERNATIONAL, INC.,

Defendant.

CIVIL ACTION No: 03 cv 4821

Hon. Joseph A. Greenaway, Jr.,
U.S.D.J.

Hon. G. Donald Haneke,
U.S.M.J.

DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiff Forestal Guarani S.A. ("Forestal") is an Argentinean lumber company that has asserted a breach of contract claim against Defendant Daros International, Inc. ("Daros") for payment of \$419,553.71 for wooden finger-joints allegedly sold to Daros for re-sale in the United States. Now that discovery has closed, Daros has confirmed what it has always known -- Forestal's claim lacks legal substance. Forestal's breach of contract claim is not supported by a written contract between the parties. The absence of a written contract is fatal to Forestal's claim.

Not only has Forestal admitted the absence of a written contract covering the sale of the goods at issue, but at each turn, Forestal has frustrated Daros's efforts to obtain discovery concerning the underpinnings of Forestal's claim. Despite having multiple opportunities to respond to clear and unambiguous discovery requests, Forestal has flaunted its discovery obligations and refused to produce to Daros the books and records that evidence the alleged amounts due and owing from Daros. The only documents produced by Forestal to substantiate its claim are a series of unsigned invoices. Forestal's entire claim rests on these invoices and a deficient certification from Forestal's in-house accountant that does not identify what

invoices are unpaid, due and owing. The evidence produced by Forestal is insufficient to establish a prima facie claim for breach of contract and/or establish that the amount claimed is owed by Daros.

This matter is ripe for summary judgment. Not only is there no written contract between the parties, but Forestal has otherwise wholly failed to support its damages claim and justify presenting this matter to a jury.

PROCEDURAL HISTORY

Daros removed this matter to federal court on or about October 24, 2003, on the basis of federal question jurisdiction pursuant to the United Nations Convention on Contracts for the International Sale of Goods, 15 U.S.C. App., International Contracts, Art. I (the "CISG"). See ¶2 of the Certification of Daniel Mateo, Esq. ("Mateo Cert."), filed herewith. After answering the Complaint, Daros served Plaintiff with Interrogatories and a Request for Production of Documents. Among the items Daros requested of Forestal were:

- Any information regarding the terms and conditions of the contract alleged in the Complaint and any documents that evidence the alleged contract. See Mateo Cert., ¶3;
- All documents, including but not limited to book accounts, balance sheets and invoices, evidencing all amounts allegedly due from Daros to Forestal under the

alleged contract and evidencing what payments have been made. See Mateo Cert., ¶3;

- All documents evidencing any written or oral request for payment made by Forestal, as alleged in paragraph 4 of the Complaint. See Mateo Cert., ¶3;
- All documents evidencing all payments made from Daros to Forestal, including but not limited to copies of all canceled checks, copies of bank statements showing each such payment and any receipts evidencing such payments. See Mateo Cert., ¶3; and
- Forestal's calculation of damages and any documents that set forth that calculation. See Mateo Cert., ¶3.

Forestal failed to timely and adequately respond to Daros's discovery requests, requiring the Honorable G. Donald Haneke to enter an Order on June 7, 2004, mandating that Forestal fully respond to Daros's Interrogatories and Document Requests by June 18, 2004. See Mateo Cert., ¶4. Forestal did not respond until June 30, 2004,--nearly two weeks after it was ordered to do so--and its responses were incomplete, improper and not certified as required by Federal Rule of Civil Procedure 33(b)(2). See Mateo Cert., ¶5.

Due to Forestal's repeated discovery deficiencies, on October 5, 2004, this Court ordered Forestal to pay Daros \$5,037.69 in discovery sanctions and gave Forestal yet another opportunity to respond to Daros's discovery requests. See Mateo Cert., ¶6. To date, however, Forestal has yet to fully respond to Daros's Document Requests in that:

- Forestal has not produced any written contract to support its breach of contract claim;
- Forestal has not produced any documents that show proof of payment, request for payment or responses to requests for payment; and
- Aside from invoices, Forestal has not produced any documents that form the basis of the Certification of accountant Gricelda Beatriz Zaneck, upon whose Certification Forestal bases its damages claim.

See Mateo Cert., ¶7.

Unable to substantiate Forestal's claims through the documents produced in discovery, Daros noticed depositions pursuant to Federal Rule of Civil Procedure 30(b)(6). The 30(b)(6) depositions requested, in relevant part, that Forestal produce one or more corporate representatives with knowledge of the following information:

- Forestal's relationship with Daros;
- Forestal's corporate accounting practices, accounts payable and accounts receivable;
- Any communications, contracts, invoices, requests for payment or other documents exchanged with Daros;
- Payments received from Daros on the alleged contract;
- The damages Forestal seeks in this matter from Daros.

See Mateo Cert., ¶8.

Additionally, as part of Daros's 30(b)(6) deposition notice, Daros requested that Forestal produce certain documents, including Forestal's book accounts and balance sheets, documents evidencing Forestal's receipt of all money and/or payments from Daros (including receipt of all wire transfers from Daros) and

documents evidencing Forestal's calculation of the amount it alleges Daros owes. See Mateo Cert., ¶9.

In response to the 30(b)(6) deposition notices, Forestal identified Pedro Juan Lopez Vinader ("P. Vinader"), Christian Lamiaux ("Lamiaux") and Maria Elena Lopez Vinader ("M. Vinader") as corporate representatives with information concerning the categories contained in the notice. See Mateo Cert., ¶10. P. Vinader is the President of Forestal's Board of Directors and Forestal's Chief Executive Officer. See transcript of P. Vinader deposition, attached as Exhibit A to Mateo Cert., 10:17-19, 90:10-12. Lamiaux is part of Forestal's staff, and was responsible for coordinating and generating the invoices sent from Forestal to Daros, including overseeing the contents of those invoices. See transcript of Lamiaux deposition, attached as Exhibit B to Mateo Cert., 120:18-20, 122:16-23, 126:5-25; 127:1-4, 169:1-7. M. Vinader has worked as an independent contractor for Forestal from 2000 to the present and was responsible for handling Forestal's business transactions in the United States from 2000 through 2003. See transcript of M. Vinader deposition, attached as Exhibit C to Mateo Cert., 22:15-19, 23:12-17. However, only P. Vinader and Lamiaux testified that they had the authority to testify as corporate representatives. See Mateo Cert., Exhibit A, 10:4-16; Exhibit B, 20:15-22. Further, Gricelda Beatriz Zaneck, the accountant

who allegedly reviewed Forestal's books and created a financial report upon which Forestal bases its claim, was not offered or made available as a 30(b)(6) witness. See Mateo Cert., ¶14. Despite three days of depositions, Forestal's claims remain unsubstantiated.

Daros now moves for summary judgment with respect to the purported claims asserted in Forestal's Complaint.

STATEMENT OF MATERIAL FACTS

Forestal is an Argentinean corporation with its principal place of business in Misiones, Argentina. Forestal is involved in the manufacture and sale of lumber products. See Complaint, Introductory Paragraph, ¶1. In particular, Forestal sells wooden finger-joints.¹ See Mateo Cert., Exhibit B, 55:6-8. To assist in the production of the finger-joints, Forestal entered into a business partnership with Fiyoint S.A. ("Fiyoint"), another Argentinean company, pursuant to which Forestal provided Fiyoint with unfinished wood and investment capital. See Mateo Cert., Exhibit A, 36:16-25, 37:1-2; Exhibit B, 43:11-16, 44:6-11. Fiyoint in turn used its know-how, machinery and manufacturing facility to process the raw material into finger-

¹ Finger-jointing is a wood processing technique that consists of cutting finger profiles into the ends of wood pieces, and joining them into longer pieces with an adhesive.

joints. See Mateo Cert., Exhibit B, 43:11-25, 44:1-11. Daros, a New Jersey based import-export company, helped commercialize and sell the finger-joints to third-party purchasers in the United States since neither Finyoint nor Forestal had any presence in the United States. See Mateo Cert., Exhibit A, 51:8-13.

Forestal now asserts a breach of contract claim against Daros, alleging that Daros has failed to pay certain invoices totaling \$419,553.71. See Complaint, ¶5. Forestal alleges that it shipped finger-joints to Daros valued at \$1,857,766.06. See Complaint, ¶4. Forestal alleges that Daros has only paid \$1,458,212.35, leaving a balance due of \$419,553.71. See Complaint, ¶5. Despite its allegations, Forestal has not and cannot dispute several material facts. Namely:

- This matter deals with an international transaction for the sale of goods. See Complaint, generally.
- Both Argentina and the United States are signatories to the United Nations Convention on Contracts for the International Sale of Goods. 15 U.S.C.A. App., n1.
- There is no written contract between Forestal and Daros. See Mateo Cert., Exhibit A, 68:14-24; 152:11-14; Exhibit B, 35:9-13; Exhibit C, 106:23-25, 107:1.
- Forestal has not identified which invoices are unpaid. See Mateo Cert., Exhibit B, 261:21-25.
- None of the invoices are signed by Daros.

- Forestal has not produced any purchase orders, upon which the invoices allegedly are based. See Mateo Cert., Exhibit B, 256:25, 257:1-9.
- Forestal bases its claim for \$419,553.71³⁷ on the invoices produced and on the certification of Argentinean accountant Gricelda Beatriz Zaneck ("Zaneck Certification"). See Mateo Cert., Exhibit A, 129:7-15; Exhibit B, 262:22-25, 263:1-9. The Zaneck Certification admittedly failed to consider all of the relevant information. See Mateo Cert., Exhibit B, 205:10-14, 208:22-25, 209:1-2; Expert Report of Allen J. Genaldi ("Genaldi Expert Report"), filed herewith. Specifically, the Zaneck Certification notes that it did not consider, in its analysis of Forestal's financial records, all of the relevant data regarding Forestal's sales to the external market. See B.2 of Certified Translation of Zaneck Certification, attached as Exhibit D to Mateo Cert. Forestal alleges that Daros is an external market customer. See Complaint, generally. Thus, the basis of Forestal's claim rests on incomplete information and faulty calculations.
- Aside from invoices, the books and records reviewed by Gricelda Beatriz Zaneck ("Zaneck") have not been produced in response to Daros's discovery requests. See Mateo Cert., ¶15.
- Zaneck was disqualified as a witness by an Argentinean court, which found that Zaneck could not serve as an impartial witness. See Certified Translation of May 5, 2004 Argentinean Court's Order disqualifying Zaneck as a witness, attached as Exhibit F to Mateo Cert.

Accordingly, Daros now requests that this Court grant its motion for summary judgment.

LEGAL ARGUMENT

THE SUMMARY JUDGMENT STANDARD

Rule 56 (c) of the Federal Rules of Civil Procedure governs the standard to be employed by courts when addressing summary judgment motions. Pursuant to Rule 56 (c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c); see also Gottshall v. Consolidated Rail Corp., 56 F.3d 530, 533 (3d Cir. 1995). A dispute is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Connors v. Fawn Mining Corp., 30 F.3d 483, 489 (3d Cir. 1994) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)).

Further, "[a] fact is material when it might affect the outcome of the suit under the governing law." Connors, 30 F.3d at 489. "The moving party has the initial burden of informing the court of the basis for a motion of summary judgment and pointing out those parts of the record which he or she believes demonstrate the absence of a genuine issue of material fact."

Id. However, "if the moving party can satisfy [its] initial

burden, the nonmoving party 'may not rest upon the mere allegations or denials of [its] pleadings, but [its] response ... must set forth specific facts showing that there is a genuine issue for trial.'" Id. (quoting Gans v. Mundy, 762 F.2d 338, 341 (3d Cir.)); see also Quiroga v. Hasbro, Inc., 934 F.2d 497, 500 (3d Cir. 1991) (declaring that non-movant may not "rest upon mere allegations, general denials, or...vague statements"). Thus, if the non-movant's evidence is merely "colorable" or is "not significantly probative," the court may grant summary judgment.

POINT I

DAROS IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THERE IS NO WRITTEN CONTRACT BETWEEN THE PARTIES.

Forestal has asserted a breach of contract claim arising out of its alleged sale of goods - in this case, finger-joints - to Daros. In most of the United States, the sale of goods is generally governed by the Uniform Commercial Code ("UCC"). It is well-settled under the UCC that a contract for the sale of goods valued at more than \$500 must be in writing. See N.J.S.A. 12A:2-201. While the alleged transaction between Forestal and Daros involves the sale of goods, it is not governed by the UCC. Instead, the transaction giving rise to Forestal's Complaint is governed by the United Nations Convention on Contracts for the International Sale of Goods ("CISG" or the "Treaty"), codified

at 15 U.S.C. Appendix (West Supp. 1991). The absence of a written contract under the CISG, as adopted by Argentina, entitles Daros to summary judgment on Forestal's breach of contract claim.

A. Background On The CISG.

The CISG is an international treaty that became effective between the United States and 10 other countries on Jan. 1, 1988. See 15 U.S.C. Appendix (West Supp. 1991). Today, the CISG boasts 65 signatory nations. See CISG: Table of Contracting States (last updated March 10, 2005) <<http://www.cisg.law.pace.edu/cisg/countries/cntries.html>> Extremely broad in scope, the CISG's rules - unless the parties agree otherwise in writing - govern all issues of contract formation and performance of international contracts for the sale of goods between merchants of signatory states. See U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods: Official English Text, 15 U.S.C.App.

The CISG has been hailed as an "international Uniform Commercial Code capable of reducing international transaction costs and bringing unity to an extremely disorganized branch of law." See Rod N. Andreason, MCC-Marble Ceramic Center: The Parol Evidence Rule and Other Domestic Law Under the Convention

on Contracts for the International Sale of Goods, Brigham Young L. Rev. 350, 351 (1999). Since Canada, Mexico, and most of the larger European nations have also adopted the CISG, the CISG governs a majority of all foreign transactions conducted by the United States. See U.S. Dept of Com., Statistical Abstract of the United States 1997, at 803-06 (117th ed. 1997). In addition, some countries have adopted the CISG as their domestic sales law. See Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 LOY.L.REV. 43, 46 (1991). Further, in the United States, the Permanent Editorial Board for the Uniform Commercial Code has used the Convention as a constructive model for reforming the UCC. See Andreason, Brigham Young L. Rev. at 351.

The purpose of drafting the CISG was to create a framework or uniform set of rules to govern international sales contracts. See U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods: Official English Text, 15 U.S.C.A. App. As Secretary of State George Schultz wrote to President Ronald Reagan in recommending ratification of the convention:

Sales transactions that cross international boundaries are subject to legal uncertainty - doubt as to which legal

system will apply and the difficulty of coping with unfamiliar foreign law. The sales contract may specify which law will apply, but our sellers and buyers cannot expect that foreign trading partners will always agree on the applicability of United States law. Insistence by both parties on this sensitive point can prolong and jeopardize the making of the contract.

The Convention's approach provides an effective solution for this difficult problem. When a contract for an international sale of goods does not make clear what rule of law applies, the Convention provides uniform rules to govern the questions that arise in the making and performance of the contract.

[Letter of Submittal (Aug. 30, 1983), reprinted at 15 U.S.C. Appendix at 364 (West 1998).]

In short, the CISG governs virtually all sales transactions "between parties whose places of business are in different" signatory States. See Andreason, Brigham Young L. Rev. at 351. Indeed, a signatory's assent to the CISG "necessarily incorporates the CISG as part of that nation's domestic law." BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333, 337 (5th Cir. 2003).

B. The CISG Governs This Dispute.

The CISG applies to "all contracts [for the sale of goods] between parties with places of business in different nations, so long as both nations are signatories to the [CISG]." See

Filanto S.P.A. v. Chilewich Int'l Corp., 789 F.Supp. 1229, 1237 (S.D.N.Y. 1992); U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods: Official English Text, 15 U.S.C.A. App.² Not only are the United States and Argentina both signatories to the CISG, but the Complaint here arises out of an alleged sale of goods by Forestal, an Argentinean company, to Daros, an entity with its principal place of business in the State of New Jersey. See Complaint, ¶¶ 1, 2. Thus, the CISG governs this dispute.

C. The CISG Preempts Forestal's State Common Law Breach of Contract Claim.

The CISG establishes "substantive provisions of law to govern the formation of international sales contracts and the rights and obligations of the buyer and the seller." See U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods: Official English Text, 15 U.S.C.A. App. Where, as here, a contractual dispute between parties is governed by the CISG, that Treaty preempts any state law that would otherwise govern the action. Asante Technologies, Inc. v. PMC-Sierra, Inc., 164 F.Supp.2d 1142, 1147 (N.D.Cal. 2001) (holding that the CISG preempted plaintiff's state law claims for breach of contract); Filanto S.P.A. v.

² To date, there is no reported New Jersey or Third Circuit case law interpreting the CISG.

Chilewick Int'l Corp., 789 F.Supp. 1229, 1237 (S.D.N.Y.

1992) (noting that the CISG is considered "state law" because the "treaties of the United States are as much a part of the law of every state as its own local laws and Constitution.") (internal citation omitted).

Accordingly, Forestal's state law breach of contract claim is preempted by the CISG and must, therefore, be analyzed under the CISG.

D. The CISG, As Adopted and Modified by Argentina, Requires a Contract for The Sale of Goods To Be In Writing.

Article 11 of the CISG provides that "[a] contract of sale need not be concluded or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." The CISG, however, allowed its signatories to opt-out of certain provisions of the Treaty, including Article 11. See 15 U.S.C.A. App., Art. 95.³ Argentina chose to opt out of Article 11, which allows for the enforcement of oral contracts of sale. See 15 U.S.C.A. App., n.1. Thus, as

³ Specifically, Article 96 provides , in relevant part:
A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration...that any provision of Article 11...of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State. 15 U.S.C.A. App., Art. 96.

ratified by Argentina, the CISG provides that "a contract of sale . . . to be made in any form other than in writing does not apply where **any** party has [its] place of business in the Argentinean Republic." See 15 U.S.C.A. App., n.1. (emphasis added). Since Forestal's principal and only place of business is in Argentina, the CISG expressly requires that a contract of sale with an Argentinean entity be in writing.

Here, it is undisputed that no written contract exists between the parties as required by Argentina's ratification of the CISG. In fact, all three witnesses produced by Forestal testified as to the non-existence of any written contract between the parties:

Question: Was this agreement that you've been testifying to between Daros and Forestal Guarani memorialized in a written document?

P. Vinader Answer: We never signed anything.
...

Question: Not a written contract?

P. Vinader Answer: No.

See Mateo Cert., Exhibit A, 68: 14-24.

Question: Was that relationship ever formalized in any written document that formalizes the relationship?

Lamiaux Answer: The only document is the verbal agreement.

See Mateo Cert., Exhibit B, 35:9-13.

Question: Do you know if there was any written contract between Forestal Guarani and Daros regarding their relationship?

M. Vinader Answer: I don't think so.

See Mateo Cert., Exhibit C, 106:23-25, 107:1.

The absence of a written contract violates the CISG as ratified by Argentina. Forestal's claim for breach of contract is, thus, preempted and barred by the CISG. The Court should, therefore, grant Daros's motion for summary judgment as a matter of law.

POINT II

FORESTAL HAS FAILED TO PRODUCE ANY CREDIBLE EVIDENCE TO SUBSTANTIATE ITS CLAIM.

Although the absence of a written contract under the Argentinean version of the CISG is sufficient by itself to bar Forestal's breach of contract claim, Forestal has, in addition, failed to produce any credible, probative evidence to otherwise establish a claim for breach of contract. Despite repeated requests for discovery, Forestal's document production consists primarily of the unsigned invoices it sent to Daros. See Mateo Cert., ¶15. These invoices are not accompanied by purchase orders, do not reference purchase orders and are not supported by even the most basic accounting documents or business records. See Mateo Cert., ¶16, Exhibit E. Instead, Forestal's case is

based on a certification of an Argentinean accountant who apparently reviewed some of Forestal's documents and concluded, without more, that there is an amount due of \$419,553.71.

A. The Invoices Produced Do Not Establish A Contract.

The invoices produced by Forestal in support of its claim for alleged monies owed do not establish a contract. In particular, all of the invoices produced by Forestal are unsigned, were created unilaterally by Forestal, do not contain language evidencing, either explicitly or implicitly, that the invoices reflect the parties' final agreement, and all note the term of payment as "contado."⁴ See Mateo Cert., Exhibit E. In fact, Forestal's reliance on invoices noting the term of payment as "contado" alone undermines its claim for monies owed, as "contado" signifies that Daros paid for the goods upon receipt. Consequently, the invoices do not establish a written agreement between the parties and suggest that payment was made at the time the goods were delivered.

Further, the invoices at issue would not establish a written contract under our domestic law. Although domestic law in contradiction with the CISG should not be applied when the

⁴ Payments made in the form of "contado" are payments made at the time of purchase. See BUTTERWORTHS SPANISH/ENGLISH LEGAL DICTIONARY, Lexis Law Publishers, 1991. In common parlance, "contado" means C.O.D. (cash on delivery), i.e. no goods delivered until payment is received.

CISG preempts the matter, domestic law not in contradiction with the CISG's text or principles may have some relevance. See MCC-Marble Ceramic Ctr. v. Ceramic Nuova d'Agostino, S.p.A., 144 F.3d 1384, 1391 (11th Cir. 1998) (noting that courts "applying the CISG cannot...upset the parties's reliance on the [CISG] by substituting familiar principles of domestic law *when the [CISG] requires a different result*") (emphasis added); Andreason, Brigham Young L. Rev., at 372.

Under New Jersey law, unsigned invoices that do not evidence a final agreement between the parties have been held insufficient to satisfy the Statute of Fraud's writing requirement. For example, in Michael Halebian N.J., Inc. v. Roppe Rubber Corp., 718 F.Supp. 348 (D.N.J. 1989), plaintiff distributor of commercial products sued defendant manufacturer alleging, among other things, breach of contract. Defendant asserted that the parties had not entered into an enforceable contract. Id. at 362-63. Plaintiff sought to establish a written contract by introducing an unsigned purchase order and invoice for the sale of goods. Id. at 363. The United States District Court for the District of New Jersey held that the purchase order and invoice did not satisfy the Statute of Frauds, as the documents "are not writings in confirmation of the contract, do not indicate that an agreement had been entered into between the parties and [lacked] the signature of the party

to be charged." Id. at 364.

Similarly, in Huyler Paper Stock Company v. Information Supplies Corporation, 117 N.J. Super. 353, 356 (L. Div. 1971), plaintiff engaged in the purchase and sale of paper waste and scrap. Plaintiff's business was "highly competitive" and it was not customary in the trade to have written contracts with the sellers of the paper waste. Id. at 356. Defendant was engaged in the business of processing data information cards, which business generated a substantial quantity of paper scrap. Id. Plaintiff entered into an oral agreement, whereby plaintiff would purchase and install a paper baling press at defendant's plant, and defendant would pay for the baler in the form of a credit to plaintiff against the sales price of the waste which defendant sold to plaintiff. Id. at 357. Defendant also agreed to sell all of its paper waste to plaintiff for a period of two years from the time the baler was installed. Id.

Subsequently, defendant refused to continue selling to plaintiff. Id. at 358. Plaintiff sued for defendant's breach of the oral agreement to sell its paper waste to plaintiff for a period of two years. Id. Finding that this arrangement constituted the sale of goods over \$500, the court held that the Statute of Frauds applied. Id. at 359. Plaintiff contended that the statute's requirements were met by plaintiff's purchase invoices, which reflected all the terms of the contract with the

exception of its duration. Id. at 362. The court disagreed, holding that the invoices did not establish a contract, as the invoices were "authored by plaintiff and none of the invoices contain the signature of defendant--the party to be charged." Id. at 363.

Here, the CISG, as ratified by Argentina, mandates the existence of a written contract to enforce an agreement for the sale of goods. The general purpose of requiring a signed memorandum in writing is to protect against "fraudulent claims." See Coldwell Banker Commercial/Feist & Feist Realty Corp. v. Blancke P.W., LLC, 368 N.J. Super. 382, 399 (App. Div. 2004). Thus, under both the CISG and our domestic law, the invoices presented by Forestal are insufficient to satisfy the requirement for a contract in writing.

In support of its damages claim for breach of contract, Forestal presents its unilaterally created invoices, not signed by Daros, and devoid of any indication that the invoices are writings in confirmation of the alleged contract. See Mateo Cert., ¶16. Moreover, Forestal has not even identified which of the 114 invoices it produced remain unpaid by Daros. See Mateo Cert., Exhibit B, 261:21-25. As such, even under United States domestic law, Forestal's claim for breach of contract is barred by the absence of a written contract. Even if the invoices constituted contracts, Forestal's claim still fails, as the

invoices are unsigned by the party to be charged -Daros-and do not indicate that they are writings in confirmation of an alleged oral contract. See Mateo Cert., Exhibit E.

Accordingly, the Court should grant Daros's motion for summary judgment.

B. The ZaneK Certification Upon Which Forestal's Claim Is Based, Is Incomplete and Insufficient.

In addition to unsigned invoices, Forestal relies upon the certification of Argentinean accountant Gricelda Beatriz ZaneK ("ZaneK Certification") to support its claim against Daros for \$419,553.17. Forestal requested that Gricelda Beatriz ZaneK ("ZaneK"), Forestal's in-house accountant, review its books and records and certify as to amounts Daros owed Forestal. The ZaneK Certification purports to substantiate the outstanding balance claimed by Forestal. See Mateo Cert., Exhibit A, 129:7-15, Exhibit B, 262:22-25, 263:1-9. The certification, however, is fatally flawed, as it admittedly relies on incomplete data, and fails to consider key information that would assist the trier of fact in determining what, if any, amount Daros owes Forestal. Further, aside from Forestal's invoices, none of the documents that form the basis of ZaneK's Certification have been produced by Forestal in discovery. See Mateo Cert., ¶15.

Specifically, ZaneK's Certification states that she reviewed Forestal's "book entries in the accounts *Sales to the*

External Market and Debtors by Sales to the External Market

(copy of invoices, notes of credits, receipts), General Daily Ledger..." and other financial information. See Mateo Cert., Exhibit D, B.1. Zaneck specifically explains, however, that her review of Forestal's documents was incomplete and did not include certain financial information, such that Zaneck was unable "to assert that the declared *Income by Sales to the External Market* included all of the stated operations during the examined period." See Mateo Cert., Exhibit D, B.2. (emphasis in original). Indeed, Forestal's claimed transactions with Daros would have involved sales to the external market, as Forestal is an Argentinean entity and Daros is a United States entity. Zaneck's failure to review *Income by Sales to the External Market* at the very least renders Zaneck's Certification incomplete.

Moreover, Zaneck's suitability as a credible witness is doubtful. Forestal is currently involved as a defendant in separate litigation in Argentina where it attempted to introduce testimony by Zaneck to support its defenses. Plaintiff in that litigation successfully moved to have Zaneck disqualified as a witness. See Mateo Cert., Exhibit F. The Argentinean court hearing the matter granted the motion, disqualifying Zaneck as a witness. See Mateo Cert., Exhibit F. Thus, Zaneck's impartiality and credibility are questionable. In fact, none of the assertions contained in her certification have been subject

to cross-examination, as she has not been offered by Forestal as a witness. See Mateo Cert., ¶14.

In an effort to conduct its own examination of what amounts, if any, Daros owed Forestal, Daros repeatedly requested-- through interrogatories, document requests and deposition notices-- that Forestal produce its financial books, records, ledgers and any other information that support Forestal's claimed damages. See Mateo Cert., ¶3, 8. Despite these repeated requests, however, Forestal failed to produce any of its books, records and ledgers, and failed to produce Zanek as a witness, despite testifying that it based its claim on Zanek's review of its financial documents. See Mateo Cert., ¶14, 15. In fact, when Daros asked P. Vinader, President and CEO of Forestal, why Forestal had not produced its financial books and records, P. Vinader responded that those documents could only be produced "under the request of a [United States] judge" to an Argentinean judge, and that, further, making copies of those documents was "not practical because...the pages are enormous." See Mateo Cert., Exhibit A, 172:7-25; 173:1-8.

To further test the veracity of the statements contained in Zanek's Certification, Daros retained the services of Grant Thornton, a very respected accounting, tax and business advisory organization. See Genaldi Expert Report. Counsel for Daros

asked Allen J. Genaldi ("Genaldi"), a Director in Grant Thornton's Forensic Accounting and Investigative Services practice, to review and analyze the ZaneK Certification as well as the schedules accompanying the ZaneK Certification. See Mateo Cert., ¶19, Genaldi Expert Report, ¶3. Upon his review of the ZaneK Certification, Genaldi concluded that "the ZaneK Report is flawed and cannot be relied upon." See Genaldi Expert Report, ¶5. Namely, the Genaldi Expert Report finds that "the work performed by Ms. ZaneK does not conform to certain standards set forth by the [American Institute of Certified Public Accountants] in the following key areas...--"

- ZaneK's Certification fails to identify the applicable auditing standards under which ZaneK performed her review;
- ZaneK's Certification is inconsistent with attestation or consulting services standards;
- ZaneK's work does not conform to United States standards;
- ZaneK did not meet the professional standard of care in preparing her certification; and
- ZaneK did not meet the "sufficient relevant data" standard in preparing her certification.

See Genaldi Expert Report, ¶6.

The Genaldi Expert Report explains that the ZaneK Certification "fails to establish the sufficiency of data used

to support the 'certification.'" See Genaldi Expert Report, ¶11. Specifically, the Genaldi Expert Report questions Zaneck's analysis of Forestal's records of its sales to the external market, and finds the data relied upon by Zaneck insufficient. See Genaldi Expert Report, ¶11. The Genaldi Expert Report highlights Zaneck's admission that her "task of reviewing did not allow [her] to assert that the declared *Income By Sales to the External Market* included all of the stated operations during the examined period," and concludes that Daros, as an alleged external market customer, "may be directly impacted by this disclosure." See Genaldi Expert Report, ¶11. The Genaldi Expert Report further concludes that it is Zaneck's failure to examine all of the relevant information as to any amount owed by Daros that may lead to "false conclusions, rendering the work performed [by Zaneck] insufficient for use as a basis for conclusions and judgments." See Genaldi Expert Report, ¶11.

The Genaldi Expert Report also analyzes the schedules attached to the Zaneck Certification, which were the only documents attached to the certification to purportedly buttress Zaneck's findings. See Mateo Cert., Exhibit D. Genaldi notes in his Report that he was unable to confirm Zaneck's findings "based solely on the information provided in those schedules...that would independently confirm or impeach Ms. Zaneck's basis for her conclusion about the amount owed" by Daros. See Genaldi Expert

Report, ¶13. Ultimately, the Genaldi Expert Report finds the ZaneK Certification is "inadequate" because the certification fails to contain a "complete statement of all opinions to be expressed and the basis and reasons thereof." See Genaldi Expert Report, ¶13. (internal quotations omitted.)

Thus, Forestal's reliance on a flawed and incomplete accounting of its books and records further serves to undermine its claim for damages.

C. The Court Should Grant Daros's Motion for Summary Judgment Because Forestal Has Failed To Establish the Existence of a Genuine Issue For Trial.

"The plain language of Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Forestal has not and cannot establish specific facts showing that there is a genuine issue for trial here. See Connors v. Fawn Mining Corp., 30 F.3d 483, 489 (3d Cir. 1994) (internal citations omitted). Simply stated, Forestal has wholly failed to meet its burden of proof and summary judgment in favor of Daros, is, thus, warranted.

Plaintiff's original complaint against Daros was filed in 2002. After more than three years of litigation and the completion of discovery, Forestal has failed to produce evidence sufficient to establish a prima facie claim for breach of contract. Forestal's claim rests entirely on unsigned invoices created by Forestal and on a deficient certification - neither of which identifies which of the invoices produced by Forestal are unpaid, due and owing. Forestal's claim therefore fails as a matter of law, as there are no genuine or material facts in dispute and no evidence that would permit a rational fact finder to rule in Forestal's favor. As such, Daros should be granted summary judgment.

CONCLUSION

Forestal's claim not only fails under the CISG, but also fails as a matter of fact because it is based on an incomplete and fatally flawed accounting of Forestal's books and records as they relate to Daros. Where, as here, the evidence does not present a genuine issue of material fact, summary judgment is warranted. As such, Daros respectfully requests that this Court enter summary judgment in favor of Daros and against Forestal, and dismiss Forestal's Complaint with prejudice.

/s/ Daniel Mateo

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Dated: